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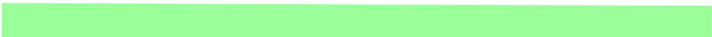

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

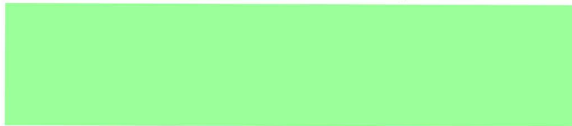


Date: **JAN 29 2013** Office: NEBRAKSA SERVICE CENTER FILE: 

IN RE: Petitioner: 
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an educational and research foundation. It seeks to employ the beneficiary permanently in the United States as a math department coordinator pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the labor certification required a bachelor's degree in math, along with sixty months of experience in the proffered job. The director further determined that the petitioner submitted evidence to establish that the beneficiary was awarded a Bachelor of Science degree in math but that the petitioner failed to demonstrate that the beneficiary meets the experience requirements of the position.

On appeal, counsel asserts that the beneficiary meets the minimum experience required for the position.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner has submitted evidence to show that the beneficiary possesses the foreign equivalent of a bachelor's degree in math that was obtained in 1996. The petitioner has also submitted employment letters pertaining to the beneficiary's work experience. The issue in this case is whether the beneficiary's degree and work experience constitute a U.S. advanced degree or a foreign degree equivalent which comply with the terms of the labor certification.

As noted above, the DOL certified the ETA Form 9089 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. See *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in math is the minimum level of education required. Line 6 reflects that 60 months of experience in the job offered is required for the job. Line 7 reflects that no alternate field of study is acceptable. Line 8 reflects that no alternative combination of education or experience is acceptable. Line 9 reflects that a foreign educational equivalent is acceptable. Line 10 reflects that experience in an alternate occupation is not acceptable.

Part H, line 11, of the labor certification reflects the required job duties as:

- Design and evaluate a high quality math program for students, develop advanced placement program in math; assess students' math abilities, place students in appropriate math classes, design benchmark tests and track students' progress in math concepts; produce reports out of MAP testing for students' progress in math to differentiate math instruction in class and establish goals for the math department; design and evaluate a supportive tutoring program for students in need and an enrichment curriculum or talented students in the curriculum subject of math; serve as the primary point of contact for parents in these programs; evaluate, mentor and design professional development for the faculty in the area; establish and enhance relationships with universities and other institutional partners; keep abreast of new discoveries in the area of math.

Part H, line 14, of the labor certification does not reflect any required specific skills or other requirements.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's five years of work experience in the job offered, he represented the following:

- That he was employed by [REDACTED] as a "math teacher" from September 1, 2000 through August 25, 2008, and that his job duties consisted of "Taught math to students of all levels; Planned and implemented approved program of study that, as

much as possible, meets the individual needs, interests and abilities of students' curriculum; Prepared a written lesson plan describing daily learning experiences; Monitored and assessed student progress and communicates the same on a regular basis to students and their parents." The beneficiary indicated that his supervisor was [REDACTED] General Director.

- That he was employed by the petitioner since August 1, 2008 as a "math teacher." However, since the petitioner noted in Part J, line 21, that the beneficiary did not gain any of his qualifying experience with the petitioner in a substantially comparable position, and the labor certification does not permit experience in an alternate occupation, this job experience will not be considered further.

The petitioner submitted the following employment letter:

- A letter dated January 20, 2011 from [REDACTED] General Director of [REDACTED] who stated that the learning center employed the beneficiary as a math teacher from September 1, 2000 through August 25, 2008. The declarant further stated that the beneficiary worked as a math teacher in his first year, and that he was then assigned to teach advanced math classes for high school grades and that he also conducted home visits and maintained close contact with parents. The declarant stated that after three years, the beneficiary was promoted to the position of advanced math coach and as such he prepared students for the university entrance exam; that after being employed by the company for one year the beneficiary started teaching advanced classes and became a guidance counselor. The declarant stated that during the 2006/2007 academic year the beneficiary was promoted to the position of a general coordinator of advanced classes at five different branches. The declarant describes some of the beneficiary's job duties.

The information provided in the employment letter demonstrates that [REDACTED] employed the beneficiary as a math teacher from September 1, 2000 to 2006. It also demonstrates that the beneficiary was employed as a general coordinator during the 2006/2007 academic year, which is less than the five years required.

The petitioner stated in an employment letter dated July 28, 2011, that it has employed the beneficiary as a math teacher since August 1, 2008, and that the beneficiary would be promoted to math department coordinator upon his adjustment of status to permanent resident. Crucially, the beneficiary is not credibly described as having coordinated a math department for five years prior to the priority date of April 28, 2011. Counsel asserts that the beneficiary does qualify for the position with sufficient work experience and that on the Form ETA 9141, Application for Prevailing Wage Determination, it indicated that the employer would accept work experience in math teaching or curriculum development. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the

associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification. *See Matter of Michelin Tire Corporation*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). Because the petitioner did not indicate on the labor certification that it would accept work experience in math teaching or curriculum development, the AAO does not accept the employment statements as evidence of the beneficiary's five years of employment as a math department coordinator. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). Regardless, the beneficiary does not describe himself on the ETA Form 9089 or Form G-325A, Biographic Information, as a math department coordinator.

To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is April 28, 2011. *See Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act.Reg.Comm.1977)..

Accordingly, it has not been established that the beneficiary has the requisite 5 years of experience in the job offered as required by the ETA Form 9089 or that he is qualified to perform the duties of the proffered position. 8 C.F.R. § 204.5(g)(1).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.